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No. 07-244

In the Supreme Court of the United States

QIAN GAO, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals permissibly exercised discretion to dismiss petitioner's immigration appeal under the fugitive disentitlement doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 481 F.3d 173. The decision of the Board of Immigration Appeals (Pet. App. 11a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2007. A petition for rehearing was denied on May 10, 2007. The petition for a writ of certiorari was filed on June 15, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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STATEMENT

The immigration judge found petitioner ineligible for asylum and ordered him deported. The Board of Immigration Appeals (Board) dismissed his appeal because he failed to file a brief, and petitioner did not seek judicial review of that order. Petitioner failed to comply with an order to report for deportation, and remains a fugitive nearly a decade later. While a fugitive, petitioner moved the Board to reopen his deportation proceeding. The Board denied his motion, and the court of appeals dismissed his petition for review pursuant to the fugitive disentitlement doctrine.

1. Petitioner is a native and citizen of the People's Republic of China. Pet. App. 3a. On November 9, 1994, petitioner entered the United States illegally. *Ibid.* Shortly thereafter, petitioner filed an application for asylum and withholding of deportation, in which he asserted that he had been persecuted in China because of his Buddhist faith. *Ibid.* An immigration judge denied the application because petitioner had not presented credible evidence to substantiate his claims of persecution. *Ibid.* Petitioner appealed to the Board, but he failed to file a brief in support of his appeal. *Id.* at 2a. On December 30, 1996, the Board summarily dismissed his appeal. *Ibid.* Pursuant to petitioner's request, he was granted voluntary departure; he had until January 29, 1997, to leave the country voluntarily rather than be deported. See *id.* at 3a; C.A. App. 311-312. Petitioner did not seek judicial review of the Board's decision, nor did he depart the country as ordered. Pet. App. 3a.

By notice dated December 12, 1997, immigration officials directed petitioner to surrender for deportation on January 22, 1998. Pet. App. 3a; C.A. App. 9. Petitioner signed a receipt for the notice on January 12, 1998. Pet.

App. 3a; C.A. App. 10. Petitioner failed to report as ordered, and apparently has remained in the United States illegally ever since. Pet. App. 3a.

2. On July 1, 2005, more than seven years after he failed to surrender, petitioner filed with the Board a motion to reopen his case. Pet. App. 4a. Petitioner asserted that he had married and had two children, and that as a result he and his family would face persecution under China's population-control policies if he were deported. *Ibid.* The government opposed the motion to reopen, both because it was not timely filed, see 8 C.F.R. 1003.2(c)(2), 1208.18(b)(2)(i), and because petitioner's status as a fugitive precluded him from seeking further relief. C.A. App. 4-7. On September 12, 2005, the Board denied the motion to reopen as untimely. Pet. App. 12a-13a. Petitioner sought review in the court of appeals.

3. The court of appeals dismissed the petition for review based on the fugitive disentitlement doctrine. Pet. App. 1a-10a. The court first explained the "well established" principle that courts have discretion to dismiss appeals by fugitives from justice, a principle that "applies with full force to an alien who fails to comply with a notice to surrender for deportation." *Id.* at 4a, 5a. The doctrine permits dismissal of a fugitive's appeal for at least four different reasons, including "the difficulty of enforcing any judgment rendered against a fugitive"; "the need for a sanction to redress the fugitive's affront to the dignity of the judicial process"; "the desire to * * * deter[] escape"; and "the need to redress any prejudice to the government occasioned by the fugitive's absence." *Id.* at 6a. The court of appeals stated that each of those rationales applies fully to an immigration proceeding in which "a litigant becomes a fugitive to escape judgment in the very matter on appeal." *Id.* at 7a. Al-

though a fugitive may be permitted to continue litigating a *separate* civil action, see *ibid.* (citing *Degen* v. *United States*, 517 U.S. 820, 828-829 (1996)), the court concluded that disentitlement remains an appropriate sanction for fugitives whose flight is "calculated to disrupt the very appellate process which they themselves have set in motion," *id.* at 8a (quoting *Estelle* v. *Dorrough*, 420 U.S. 534, 541-542 (1975) (per curiam)). Thus, the court noted, "every circuit that has considered the issue" has applied the fugitive disentitlement doctrine to aliens who fail to comply with a deportation or removal order. *Id.* at 6a.

The court of appeals then held that petitioner's conduct amply justified dismissing his petition for review. Pet. App. 8a-10a. In particular, the court pointed out that petitioner's motion to reopen rested largely on "events of [petitioner's] own making that transpired while he was a fugitive," meaning that permitting petitioner to obtain relief on such a theory would encourage aliens in petitioner's position to evade removal for as long as possible while developing new grounds to remain in the country. *Id.* at 9a.

Finally, the court noted that although the fugitive disentitlement doctrine is discretionary, petitioner had "fail[ed] to offer any explanation whatsoever for his fugitive status," and thus had given the court no reason to stay its hand. Pet. App. 10a. Accordingly, the court exercised its discretion to dismiss the petition for review. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and consistent with the precedent of every other circuit that has considered the issue, as well as with this Court's

longstanding endorsement of the fugitive disentitlement doctrine. No further review is warranted.

1. For well over a century, this Court has endorsed the proposition that federal courts possess discretion to preclude a fugitive from justice from seeking judicial relief during his or her flight. See *Smith* v. *United States*, 94 U.S. 97, 97-98 (1876); accord *Molinaro* v. *New Jersey*, 396 U.S. 365, 365-366 (1970); *Eisler* v. *United States*, 338 U.S. 189, 190 (1949) (per curiam); *Bonahan* v. *Nebraska*, 125 U.S. 692, 692 (1887); see also *Allen* v. *Georgia*, 166 U.S. 138, 140-141 (1897) (holding that a similar rule applied in state court was consistent with due process). "Moreover, this rule is amply supported by a number of justifications," including ensuring the enforceability of federal judgments, deterring flight from detention, and promoting orderly appellate practice. *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 242 (1993).

The courts of appeals that have considered the question unanimously agree that these same justifications permit the dismissal of an alien's appeal challenging an order directing his removal from the United States when he evades the removal order and becomes a fugitive. See *Giri* v. *Keisler*, No. 06-60569, 2007 WL 3276110, at *2 (5th Cir. Nov. 7, 2007) ("[W]e join with every other circuit that has addressed whether the fugitive disentitlement doctrine applies to appeals from the [Board] under similar facts."); *Garcia-Flores* v. *Gonzales*, 477 F.3d 439, 441-442 (6th Cir. 2007); *Sapoundjiev* v. *Ashcroft*, 376 F.3d 727, 728-729 (7th Cir.), reh'g denied, 384 F.3d 916 (7th Cir. 2004); *Antonio-Martinez* v. *INS*, 317 F.3d 1089, 1092 (9th Cir. 2003); *Arana* v. *INS*, 673 F.2d 75, 77 (3d Cir. 1982); see also *Wittgenstein* v. *INS*, 124 F.3d 1244, 1245 (10th Cir. 1997) (holding that

"we have the right to dismiss the appeal because petitioner remained a fugitive during most of the time her appeal was pending," but reinstating the appeal because the petitioner was apprehended before decision). As several of these cases point out, the fugitive disentitlement doctrine is well suited to the immigration context: an alien who petitions for judicial review of his removal, but refuses to surrender so that the removal may take place, "has the same 'heads I win, tails you'll never find me' quality that justifies disentitlement in other contexts." *Antonio-Martinez*, 317 F.3d at 1093; accord *Sapoundjiev*, 376 F.3d at 729 (the proposition that "flight ma[kes] the litigation a one-way street," and justifies dismissal, "is as applicable to the fugitive alien as it is to the fugitive criminal defendant").

Petitioner acknowledges these "unified" holdings, but suggests that the Eighth Circuit has reached a different conclusion. Pet. 15. That contention is incorrect. In *Hassan* v. *Gonzales*, 484 F.3d 513 (8th Cir. 2007), the alien sought and was granted leave to depart voluntarily after the Board rejected her asylum claim. She timely departed the country and, from abroad, continued to challenge her removal and denial of asylum. While abroad, she failed to meet with immigration officials to discuss her request for a stay of removal. The court held that in light of the alien's compliance with the voluntary departure order, her absence from the meeting (and from the country) did not preclude her from continuing to seek judicial review. *Id.* at 516. That holding is entirely inapposite here: Hassan was not a fugitive, and the Eighth Circuit did not dispute that the disentitlement doctrine could apply to an alien who, unlike Hassan but like petitioner, "attempt[ed] to evade the reach of the law." *Ibid.* Indeed, whereas Hassan de-

parted voluntarily from the United States, petitioner flouted the voluntary departure order that he himself had sought.

The courts of appeals thus are in broad agreement that they have discretion to dismiss fugitive aliens' petitions for review. Petitioner has failed to establish any intercircuit conflict warranting this Court's review.[1]

2. The decision below is not in conflict with any decision of this Court. As the decision below explains, this Court's cases squarely support applying the fugitive disentitlement doctrine in the immigration context. Indeed, nearly all of the courts of appeals that have examined the question have done so since 1996, with the full benefit of this Court's most recent fugitive disentitlement decisions.

Petitioner asserts (Pet. 6-7, 9-10) that this Court's decision in *Degen* v. *United States*, 517 U.S. 820 (1996), precludes applying the fugitive disentitlement doctrine except in criminal cases.[2] That contention is incorrect.

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[1] Petitioner also claims that the Second Circuit created an intracircuit conflict by not remanding his case, whereas it remanded another asylum challenge brought by a native of the same Chinese province. Pet. 12. No fugitive disentitlement issue was raised in the latter case, see *Zhang* v. *Gonzales*, 204 Fed. Appx. 962 (2d Cir. 2006), reh'g granted, 481 F.3d 867 (2d Cir. 2007), and the substance of petitioner's untimely motion to reopen is irrelevant in any event.

[2] Although *Degen* was expressly based on this Court's supervisory power rather than any constitutional provision, see 517 U.S. at 828, petitioner contends that both the Eighth Amendment and the Due Process Clause forbid application of the fugitive disentitlement doctrine in his case. But the Eighth Amendment has no application to deportation proceedings. Cf. *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration

In *Degen*, the Court considered whether a federal court could preclude a fugitive from defending a civil action. Degen was charged with drug offenses and fled to Switzerland, where he remained beyond the reach of the United States' criminal process. The government brought a civil action to forfeit various of Degen's real estate holdings as proceeds of drug sales. Degen, through counsel, filed an answer opposing the forfeiture. 517 U.S. at 822. The district court struck Degen's answer and entered judgment against him based on the fugitive disentitlement doctrine, and the court of appeals affirmed, *ibid.*, but this Court reversed. The Court held that precluding Degen from defending his property interest did not validly further any of the legitimate interests that it had previously identified as justifying the fugitive disentitlement doctrine: the district court's *in rem* jurisdiction over the property to be forfeited was secure, no matter where Degen was, *id.* at 825, and Degen's absence "entitle[d] him to no advantage," because the district court had various options (such as discovery sanctions) to ensure that Degen's fugitive status did not impair the litigation, *id.* at 826-827. The Court did not, as petitioner would have it, forever limit the fugitive disentitlement doctrine to criminal proceedings; rather, it held only that "[t]here was no necessity to justify" disqualifying fugitive Degen from defending the forfeiture action. *Id.* at 829.

Nothing in *Degen* detracts from the decision below. As Judge Easterbrook has explained, *Degen* focused the analysis on the "practical question" whether the litigant's "flight [has] made the litigation a one-way street."

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laws."). And disentitlement comports with due process in civil contexts just as it does in criminal cases. See, *e.g.*, *Allen*, 166 U.S. at 140-141.

Sapoundjiev, 376 F.3d at 729. Degen's absence from the United States did not have that effect on the *in rem* civil litigation. 517 U.S. at 825. By contrast, when an alien challenging his removal disregards the order putting that removal into effect, he refuses to accept the consequences of a loss in court. *Antonio-Martinez*, 317 F.3d at 1093. That is precisely the sort of "connection between a defendant's fugitive status and his appeal" that this Court has recognized as an appropriate basis for dismissal. *Ortega-Rodriguez*, 507 U.S. at 249; see Pet. App. 8a. Indeed, here petitioner's motion to reopen was based on events made possible by his failure to surrender as ordered by the immigration authorities: his marriage and the birth of his children. Pet. App. 9a.

3. Petitioner also asserts (Pet. 10-11) that the Second Circuit should not have applied the fugitive disentitlement doctrine to his case. He suggests that the Second Circuit's definition of the term "fugitive" is overbroad because it encompasses even those aliens whose home address and place of employment are known to the government. Petitioner never asserts that *he* falls into that category, or that he has complied with his legal obligation to keep the government informed of his whereabouts, see *Antonio-Martinez*, 317 F.3d at 1092 (citing Immigration and Nationality Act § 265(a), 8 U.S.C. 1305(a); 8 C.F.R. 265.1); his last known address is that to which the deportation notice was sent in 1997. But even if he remains at that address, the doctrine applies whenever an alien fails to report for removal as directed. "[I]t is far from clear that [removable aliens] will choose to be at home when agents arrive to arrest them * * * . The point of custody is to end the guessing game. That's why anyone who is told to surrender, and does not, is a fugitive." *Sapoundjiev*, 376 F.3d at 729.

Finally, petitioner asserts (Pet. 2, 11) that he never received the order to surrender for removal. Even if that fact-bound contention were suitable for this Court's review, it would still be contrary to the record evidence. The government explained to the court of appeals that petitioner had signed a certified-mail receipt for the order of removal. Gov't C.A. Br. 6; see C.A. App. 10. Petitioner did not file a reply brief in the court of appeals, and neither his petition for rehearing nor his petition for a writ of certiorari discusses his signature on the receipt. See Pet. for Reh'g 5; Pet. 2. In this Court, petitioner offers only the assertion of his counsel that he never received the notice. Pet. 2. Petitioner provides neither any statement as to his own whereabouts nor, as the court of appeals observed, "any explanation whatsoever for his [continued] fugitive status." Pet. App. 10a. The court of appeals did not abuse its discretion by applying the fugitive disentitlement doctrine in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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